

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

July 20, 2005

IN RE:

COMPLAINT OF PLANET CONNECT, INC. AGAINST  
BELLSOUTH TELECOMMUNICATIONS, INC.  
CONCERNING BELLSOUTH DSL

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DOCKET NO.  
04-00131

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ORDER DISMISSING COMPLAINT

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This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 13, 2005 for consideration of a complaint filed by Planet Connect, Inc. ("Planet Connect") against BellSouth Telecommunications, Inc. ("BellSouth") on April 29, 2004.

**BACKGROUND**

On April 29, 2004, Planet Connect filed a letter ("*Complaint*")<sup>1</sup> with the Authority stating that Planet Connect sells Internet access services, including digital subscriber line ("DSL") service.<sup>2</sup> BellSouth provides wholesale DSL service to ISDN-Net, which in turn sells DSL service to Planet Connect.<sup>3</sup> According to the *Complaint*, Planet Connect cannot sell BellSouth DSL service to a business customer in Morristown, Tennessee because the business is not a BellSouth telephone service customer.<sup>4</sup> However, if the business would switch back to BellSouth

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<sup>1</sup> The letter from Mr Evan B. McKinley, a systems consultant for Planet Connect, was received by the Authority on April 22, 2004 and was docketed as a complaint against BellSouth. A copy of the letter was sent to BellSouth, which was given until June 14, 2004 to respond in accordance with Tenn. R. & Regs. 1220-1-2- 03 See Letter to Mr Evan B McKinley from J. Richard Collier (May 13, 2004).

<sup>2</sup> Letter to Chairman Deborah Taylor Tate from Evan B McKinley, p 1 (April 29, 2004)

<sup>3</sup> *Id*

<sup>4</sup> *Id*

for telephone service, then the business could have BellSouth DSL service.<sup>5</sup> In support of the *Complaint*, Planet Connect notes that the U.S. District Court in Frankfort, Kentucky upheld a decision by the Kentucky Public Service Commission (“KPSC”) and has ruled that BellSouth cannot refuse DSL service to a competitor’s customers in Kentucky, Indiana and Tennessee.<sup>6</sup> Thus, Planet Connect argues that BellSouth is in violation of the Kentucky decisions by refusing DSL Internet access to Planet Connect’s business customer which does not subscribe to BellSouth’s telephone service.<sup>7</sup>

BellSouth filed a letter (“*Response*”) responding to Planet Connect’s *Complaint* on June 14, 2004. In its *Response*, BellSouth asserts that the decisions of the KPSC and the U.S. District Court in Kentucky do not control in Tennessee.<sup>8</sup> BellSouth states that it has appealed the Kentucky rulings to the Sixth Circuit Court of Appeals and has filed a request for a declaratory ruling with the Federal Communications Commission (“FCC”).<sup>9</sup> In addition, BellSouth argues that the decision of the TRA in Docket No. 03-00119<sup>10</sup> and the decision of the FCC in the *Triennial Review Order*<sup>11</sup> rejected efforts to require incumbent local exchange carriers (“ILECs”) to provide broadband service to competitive local exchange carrier (“CLEC”) unbundled network

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<sup>5</sup> *Id*

<sup>6</sup> *Id* Planet Connect is apparently referring to the decisions that BellSouth may not refuse to provide DSL service pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a Competitive Local Exchange Carrier (“CLEC”) that provides service over the Unbundled Network Elements Platform (“UNE-P”) See Kentucky Public Service Commission Case 2001-00432, 2002 Ky. PUC LEXIS 722, 724 (Oct 15, 2002), *aff’d sub nom BellSouth Telecommunications, Inc v Cinergy Communications Co*, 297 F Supp 2d 946, 954 (E D Ky 2003).

<sup>7</sup> Letter to Chairman Deborah Taylor Tate from Evan B McKinley, p 1 (April 29, 2004)

<sup>8</sup> Letter to Chairman Deborah Taylor Tate from Guy M Hicks, p 1 (June 14, 2004)

<sup>9</sup> *Id* at 2, fn 3

<sup>10</sup> In TRA Docket 03-00119, the Arbitrators ruled that there is no requirement at this time that BellSouth must provide retail DSL service where ITC^DeltaCom provides UNE-P local service. *In Re Petition for Arbitration of ITC DeltaCom Communications, Inc with BellSouth Telecommunications, Inc Pursuant to the Telecommunications Act of 1996*, Docket No 03-00119, Transcript of Arbitration Hearing, p 10-15 (January 12, 2004)

<sup>11</sup> See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos 01-338, 96-98, 98- 147, (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 F C C R 16,978 (August 21, 2003), corrected by *Errata*, 18 F C C R 19,020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v FCC*, 359 F 3d 554 (D C Cir 2004) (“USTA II”) cert denied, 125 S Ct 313, 316, 345 (2004) (“*Triennial Review Order*” or “*TRO*”)

elements (“UNE”) voice customers.<sup>12</sup> Finally, BellSouth asserts that its wholesale DSL transport is a federally tariffed interstate service and that the Authority lacks jurisdiction over the tariff.<sup>13</sup>

On July 23, 2004, BellSouth filed a copy of Kentucky House Bill No. 627, which became effective July 13, 2004. According to BellSouth, the legislation effectively overturned the decisions of the KPSC and the U.S. District Court in Kentucky.<sup>14</sup>

On April 19, 2005, BellSouth filed a copy of the *Memorandum Opinion and Order and Notice of Inquiry* (“*Opinion and Order*”)<sup>15</sup> issued by the FCC on March 25, 2005. In the *Opinion and Order*, the FCC found that state decisions that require BellSouth to provide DSL service over the high frequency portion of a CLEC’s UNE loop violate 47 U.S.C. § 251(d)(3) because those decisions directly conflict and are inconsistent with the FCC’s rules and policies implementing 47 U.S.C. § 251.<sup>16</sup> Requiring BellSouth to provide DSL over the high frequency portion of the loop (“HFPL”) while a CLEC provides voice service over the low frequency portion of a UNE loop facility would effectively require the unbundling of the low frequency portion of the loop (“LFPL”).<sup>17</sup> The FCC concluded in the *Triennial Review Order* that unbundling the LFPL was not required by the Telecommunications Act of 1996 and, therefore, state decisions that impose on BellSouth a requirement to unbundle the LFPL exceed the FCC’s reservation of authority under 47 U.S.C. § 251(d)(3)(B).<sup>18</sup> The FCC declined to address BellSouth’s argument that its federally tariffed DSL service is an interstate service and is subject only to federal regulation.<sup>19</sup>

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<sup>12</sup> Letter to Chairman Deborah Taylor Tate from Guy M. Hicks, pp. 2-5 (June 14, 2004).

<sup>13</sup> *Id.* at 5-8.

<sup>14</sup> Letter to Chairman Pat Miller from Guy M. Hicks, p. 1 (July 23, 2004).

<sup>15</sup> *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, FCC 05-78, WC Docket No. 03-251 (*Memorandum Opinion and Order and Notice of Inquiry*) 20 F.C.C.R. 6830 (March 25, 2005).

<sup>16</sup> *Id.* at ¶ 26.

<sup>17</sup> *Id.* at ¶ 25.

<sup>18</sup> *Id.* at ¶ 27.

<sup>19</sup> *Id.* at ¶ 32.

**JUNE 13, 2005 AUTHORITY CONFERENCE**

At a regularly scheduled Authority Conference held on June 13, 2005, the voting panel assigned to this Docket found that pursuant to the *Opinion and Order* issued by the FCC on March 25, 2005, BellSouth is not obligated to provide DSL service over a leased UNE-loop facility. Accordingly, the panel concluded that any state decision requiring BellSouth to provide DSL service over a CLEC's leased loop facility would effectively unbundle the low frequency portion of the loop and would be inconsistent with federal law. As a result, the panel voted unanimously to dismiss the *Complaint* of Planet Connect.

**IT IS THEREFORE ORDERED THAT:**

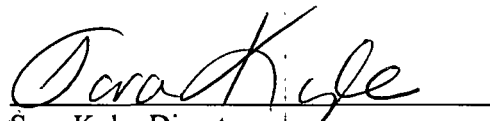
1. The *Complaint* of Planet Connect, Inc. is dismissed;
2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and
3. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.



Pat Miller, Chairman



Deborah Taylor Tate, Director



Sara Kyle, Director